

*Honorable Lauren King*

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
IN SEATTLE

WASHINGTON ELECTION INTEGRITY  
COALITION UNITED, a Washington State  
Nonprofit Corporation, et al.,

Plaintiffs,

vs.

GARTH FELL, Snohomish County Auditor,  
et al.,

Defendants.

No. C21-1354-LK

SNOHOMISH COUNTY DEFENDANTS'  
REPLY IN SUPPORT OF ITS FRCP 56  
MOTION TO DISMISS

**NOTE ON MOTION DOCKET:  
Friday, January 14, 2022**

**I. INTRODUCTION**

Plaintiff, WEiCU, does not dispute that the County never received its public records request in August 2021. Rather, WEiCU's response focuses primarily on the jurisdiction of this Court and its general disagreement with *White v. Skagit County*, 188 Wash. App. 886, 355 P.3d 1178 (2015), and related *White* cases, which hold that ballots are exempt from disclosure under Washington's Public Records Act ("PRA"). None of WEiCU's disagreements rebut Defendants' arguments or raise genuine issues of material fact, and Defendants' motion must be granted.

## II. ARGUMENT IN REPLY

### I. This Court Has Jurisdiction to Decide Defendants' FRCP 56 Motion to Dismiss.

In response to Defendants' motion to dismiss, Plaintiff, WEiCU, challenges this Court's jurisdiction by repeating arguments it raised in its Motion for Remand.<sup>1</sup> See Dkt. 19. In short, WEiCU asserts that this Court has no jurisdiction over WEiCU's public records claim because that claim arises from state law. This assertion has no merit.

As noted in Defendants' response to the Motion to Remand, the Court's supplemental jurisdiction over state law claims is appropriate in this case. See Dkt. 22. In determining whether supplemental jurisdiction should apply, the Court looks to whether state law claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. §1367(a); see *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct 1130, 16 L.Ed.2d 218 (1966). A Court has supplemental jurisdiction over any accompanying state law claim when it is part of the same case or controversy as the federal claim that provides the basis for removal.

In this case, WEiCU's PRA claim arises out of the same case or controversy as the federal claims alleged in the Complaint. WEiCU admits that its public records claim "incorporates the allegations of paragraphs 1-40," detailing purported allegations of wrongdoing. Dkt. 1-2, at 11. Those incorporated claims are based, in part, on federal law. For example, paragraph 31 alleges that as a result of Defendants' alleged wrongdoing, "Plaintiffs will suffer irreparable injury in that their fundamental rights under the Washington State Constitution and/or United States

---

<sup>1</sup> The Public Records Act claim in this case was brought solely by WEiCU. Pursuant to Local Civil Rule 7(b)(2), this Court should treat the individual pro se Plaintiffs' failure to respond as a concession that they do not oppose Defendant's FRCP 56 Motion to Dismiss.

1 Constitution, and amendments, will be further violated. *Id.*, at 9. Furthermore, the Plaintiffs claim  
2 the public records request is necessary “to prove (or disprove) the allegations” in the Complaint.  
3 *Id.*, at 12. WEiCU’s PRA claim is inextricably intertwined with the federal claims in this action.

4 This Court’s supplemental jurisdiction over WEiCU’s public records claim is supported  
5 by well-established, long standing, precedent. WEiCU’s argument to the contrary is without  
6 merit.

7  
8 II. It is Undisputed That The County Did Not Receive A Public Records Request  
9 From WEiCU in August 2021.

10 Plaintiff does not dispute that the County never received a records request from WEiCU  
11 in August 2021, as alleged in the Complaint. *See Heinemann v. Satterberg*, 731 F.3d 914, 917  
12 (9th Cir.2013) (quoting Fed. R. Civ. P. 56(e)(2)) (An “opposing party’s failure to respond to a  
13 fact asserted in the motion permits a court to ‘consider the fact undisputed for the purposes of the  
14 motion.’”). WEiCU also does not dispute that it failed to send its request to the County’s Public  
15 Records Officer. *See Parmelee v. Clark*, 148 Wash. App 748, 201 P.3d 1022 (2008), *rev. denied*,  
16 166 Wash.2d 1017, 210 P.3d 1019 (2009) (Dismissing a PRA complaint where the requestor  
17 failed to send the records request to the designated public disclosure coordinator.) These facts are  
18 dispositive and require dismissal.

19  
20 Under the PRA, an agency’s duty to respond is triggered by the *receipt* of a PRA request.  
21 *Wood v. Lowe*, 102 Wash. App. 872, 876–77, 10 P.3d 494 (1997) (“[T]he P[R]A ‘only applies  
22 when public records have been requested. In other words, public disclosure is not necessary until  
23 and unless there has been a specific request for records.’”); *Beal v. City of Seattle*, 150 Wash.  
24 App. 865, 872, n.9, 209 P.3d 872 (2009) (citing RCW 42.56.080); *Bonamy v. City of Seattle*, 92  
25  
26  
27

1 Wash. App. 403, 409, 960 P.2d 447 (1998). Because it is undisputed that the County did not  
2 receive WEiCU's request in August 2021, WEiCU's PRA claim must be dismissed.<sup>2</sup>

3 III. Under Washington Law, Ballots Are Not Subject to Public Disclosure.

4 Rather than address the fact that the County did not receive a records request in August  
5 2021, WEiCU instead argues that whether the County received its PRA request is moot because  
6 once the County obtained a copy of the request during the course of this litigation, it began  
7 processing it, and subsequently denied the portion related to ballots. WEiCU now claims that the  
8 County "failed to cite a statutory exemption for the requested records" when it notified WEiCU  
9 of the denial. Dkt. 34, at 3-4; *see* Dkt. 35. Plaintiff's arguments are without merit.<sup>3</sup>

11 Ballots are categorically exempt from public disclosure under Washington law and  
12 WEiCU was properly notified of the exemption. *White v. Clark County*, 188 Wash. App. 622,  
13 627, 354 P.3d 38 (2015), *review denied*, 185 Wash.2d 1009 (2016) (*White I*) ("We hold that  
14 [Article VI, section 6 of the Washington Constitution, various sections of Title 29A RCW, and  
15 secretary of state regulations] together constitute an 'other statute' exemption to the PRA under  
16 RCW 42.56.070(1)" exempting pre-tabulated ballot images.); *White v. Skagit County*, 188 Wash.  
17 App. 886, 898, 355 P.3d 1178 (2015) (*White II*) ("We conclude that in Washington, all 'ballots,'  
18 including copies, are exempt from production under the Public Records Act by Title 29A RCW—  
19 an 'other statute.'"); *White v. Clark County*, 199 Wash. App. 929, 939, 401 P.3d 375, 378 (2017),  
20  
21  
22  
23

24 <sup>2</sup> Alternatively, because it is undisputed that WEiCU failed to send its request to an individual designated by the  
County to receive public records requests, WEiCU's PRA claim must be dismissed. *See* Dkt. 26, at 13-15.

25 <sup>3</sup> Pursuant to Rules of Evidence 201, the Court may take judicial notice that Plaintiff, WEiCU, has made similar  
26 flawed arguments in multiple similar lawsuits filed in federal and state court. *See WEICU v. Anderson*, USDC 3:21-  
27 cv-05726-LK, Dkt. 42; *WEICU v. Wise*, 2:21-cv-01394-LK, Dkt. 29; *WEICU v. Kimsey*, 3:21-cv-05746-LK, Dkt.  
29. The Franklin County Superior Court dismissed Plaintiffs claims in *WEICU v. Beaton*. *See* Franklin County  
Superior Court Cause number 21-2-50572-11, Order Granting Motion to Dismiss filed 12/13/2021.

1 *review denied*, 189 Wash.2d 1031 (2018) (*White III*) (“RCW 29A.60.110 and WAC 434-261-045  
2 provide categorical exemptions, not conditional ones” so “ballots are exempt from production  
3 without qualification.”)

4       Regardless of whether the County received WEiCU’s request in August or processed it  
5 once received during litigation, the County properly denied WEiCU access to ballots. When it  
6 denied WEiCU’s request, the County explained that:

7  
8       Collectively, [Wash. Const. Art. VI, Sec. 6; RCW 29A.60.110; and WAC 434-261-  
9 045 (authorized by RCW 29A.04.611)] exempt ballots and ballot images from  
10 disclosure under the PRA. Furthermore, Washington courts have consistently held  
11 that ballots and ballots images are exempt from production under the PRA. See  
12 *White v. Clark County*, 188 Wn. App. 622, 354 P.3d 38 (2015) (pre-tabulated  
13 ballots are exempt from disclosure under the PRA); *White v. Skagit County*, 188  
14 Wn. App. 886, 355 P.3d 1178 (2015) (same); *White v. Clark County*, 199 Wn. App.  
15 929, 401 P.3d 375 (2017) (“We hold that RCW 29A.60.110 constitutes an express  
16 ‘other statute’ exemption for tabulated ballots.”) Accordingly, Snohomish County  
17 is denying the portion of your request that seeks ballots and ballot images.

18 Dkt 35.

19       The County’s explanation complies with RCW 42.56.210(3) by providing “the specific  
20 exemption authorizing the withholding of the record (or part) and a brief explanation of how the  
21 exemption applies to the record withheld.”” *City of Lakewood v. Koenig*, 182 Wash.2d 87, 94,  
22 343 P.3d 335 (2014).

23       In its response, WEiCU invites the Court to ignore the *White* cases because “1) review of  
24 agency decisions is *de novo* (42.56.550(3)); 2) case opinions are not an ‘other statute’ exemption  
25 ... and 3) the *White* Opinions did not involve allegations of election irregularities ... .” Dkt. 34.  
26 None of WEiCU’s asserted bases provide justification to disregard clear precedent or require the  
27 County to provide ballot images to WEiCU.

1 A Court reviews agency action under the PRA *de novo*. RCW 42.56.550(3). *De novo*  
2 review does not mean, as advanced by WEiCU, that the Court may reject prior decisions, such as  
3 *White I, II* and *III*, holding that ballots are exempt from production under the PRA. Instead, *de*  
4 *novo* review means that the “court does not give deference to the agency’s decisions.” *Wash. State*  
5 *Bar Ass’n, Public Records Act Deskbook: Washington’s Public Disclosure And Open Public*  
6 *Meetings Laws* § 16.3(2) at 16-8(2014).

7  
8 WEiCU’s further arguments are similarly flawed. Regardless of whether WEiCU agrees  
9 with the *White* decision, the precedent is clear that ballots are exempt in response to public records  
10 requests and Defendants are under no obligation to turn over redacted or unredacted ballots to  
11 WEiCU following receipt of its request.

12  
13 WEiCU further argues that ballots are de-identified consistent with RCW 29A.08.161 and  
14 therefore disclosure does not present a ballot secrecy concern. WEiCU’s argument was rejected  
15 in *White II*. There the Court found that the release of ballots, even after being separated from the  
16 security envelopes that contains voter identification, may implicate voter privacy because the  
17 release still “would risk revealing the identity of individual voters” since “voters sometimes place  
18 identifying marks on ballots contrary to voting instructions, for example by signing their names  
19 when making corrections or by writing comments about their intent,” as well as because “where  
20 there is low turnout in a small precinct, even a ballot devoid of identifying marks can be tied back  
21 to a voter by comparing it with voters credited with returning ballots on particular dates.” *White*  
22 *II*, 188 Wash. App. 895.

23  
24 Instead of supporting its claim, RCW 29A.08.161 undermines WEiCU’s argument. RCW  
25 29A.08.161 confirms the legislative intent that ballots must be kept secret by prohibiting  
26  
27

1 government bodies from linking a voter to ballot information. *See White v. Wyman*, 4 Wash. App.  
2 1071, 2018 WL 3738404, at \*5 (Wash. Ct. App. Aug. 6, 2018)<sup>4</sup> (unpublished op.).

3 IV. The Auditor Is Not A Proper Party.

4 WEICU does not refute that Auditor Garth Fell is not an “agency,” and therefore not  
5 subject to suit under the PRA. *See* RCW 42.56.010(1), (3); RCW 42.56.520; RCW 42.56.550.  
6 WEiCU’s claim PRA claim against the Auditor must be dismissed.

7  
8 In an attempt to salvage its case against the Auditor, WEiCU raises other supposed  
9 grounds, outside of the PRA, for suing Auditor Fell. Each of WEiCU’s alternative grounds are  
10 baseless. WEiCU’s asserts that “RCW 29A.68.013 permits actions against election officials for  
11 wrongful acts or neglect of duty,” and that the Auditor somehow is “a necessary party to an action  
12 under RCW 29A.60.110,” Dkt. 34 at 11-12. These claims are either (1) not pled in the Complaint  
13 or (2) rooted in elections allegations which WEiCU lacks standing to assert. WEiCU’s claims  
14 against Auditor Fell must be dismissed.  
15

16 //

17 //

18 //

19 //

20 //

21 //

22 //

23 //

24 //

---

25  
26 <sup>4</sup> *White v. Wyman* is unpublished, and therefore “may be cited as non-binding authorit[y]” and “may be accorded  
27 such persuasive value as the court deems appropriate.” Washington State Court General Rules GR. 14.1(a).

V. **CONCLUSION**

Accordingly, WEiCU's claim brought under the PRA must be dismissed.

DATED this 14<sup>th</sup> day of January, 2022.

ADAM CORNELL  
Snohomish County Prosecuting Attorney

By: /s/ Lyndsey M. Downs  
LYNDSEY M. DOWNS, WSBA #37453  
DEBORAH A. SEVERSON, WSBA #35603  
ALEX J. WITENBERG, WSBA #50356  
Deputy Prosecuting Attorneys  
Snohomish County Prosecuting Attorney, Civil Division  
3000 Rockefeller Avenue, M/S 504  
Everett, WA 98201  
Ph: (425) 388-6330 / Fax: (425) 388-6333  
[Lyndsey.downs@co.snohomish.wa.us](mailto:Lyndsey.downs@co.snohomish.wa.us)  
[Deborah.severson@co.snohomish.wa.us](mailto:Deborah.severson@co.snohomish.wa.us)  
[Alex.witenberg@co.snohomish.wa.us](mailto:Alex.witenberg@co.snohomish.wa.us)  
*Attorneys for Defendants Snohomish County and Garth  
Fell*



**DECLARATION OF SERVICE**

I declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that, on this 14<sup>th</sup> day of January, 2022, I caused to be delivered the following documents:

Snohomish County Defendants' Reply in Support of Its FRCP 56 Motion to Dismiss on the following party via the Court's CM/ECF portal at the address indicated:

Virginia P. Shogren  
Virginia P. Shogren, P.C.  
961 W. Oak Court  
Sequim, WA 98382  
[WEiCUattorney@protonmail.com](mailto:WEiCUattorney@protonmail.com)  
[vshogren@gmail.com](mailto:vshogren@gmail.com)  
*Attorney for Plaintiff Washington Election  
Integrity Coalition United*

☒ ***E-Served via CM/ECF:***  
☐ Emailed:  
☐ Facsimile:  
☐ U.S. Mail, 1st Class  
☐ Hand Delivery  
☐ Messenger Service

Kevin J. Hamilton  
Amanda J. Beane  
Nitika Arora  
Reina A. Almon-Griffin  
Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
[khamilton@perkinscoie.com](mailto:khamilton@perkinscoie.com)  
[abeane@perkinscoie.com](mailto:abeane@perkinscoie.com)  
[narora@perkinscoie.com](mailto:narora@perkinscoie.com)  
[ralmon-griffin@perkinscoie.com](mailto:ralmon-griffin@perkinscoie.com)  
*Attorneys for Intervenor Washington State  
Democratic Central Committee*

☒ ***E-Served via CM/ECF:***  
☐ Emailed:  
☐ Facsimile:  
☐ U.S. Mail, 1st Class  
☐ Hand Delivery  
☐ Messenger Service

//

//

//

//

I further declare that on this 14<sup>th</sup> day of January, 2022, I caused to be delivered the above-listed documents on the following Pro Se Plaintiffs by **First Class Postage Prepaid Mail** at the addresses indicated:

|   |   |   |
|---|---|---|
| Russell Ostlund<br>6914 – 61 <sup>st</sup> Drive NE<br>Marysville, WA 98270     | Kristy Welles<br>4811-180 <sup>th</sup> St. SW, #D207<br>Lynnwood, WA 98037     | Arthur Coday, Jr.<br>P.O. Box 1786<br>Woodinville, WA 98072                 |
| Joshua A. DeJong<br>11250 – 31 <sup>st</sup> Place NE<br>Lake Stevens, WA 98258 | Lonny Bartholomew<br>12015 Marine Drive, #158<br>Tulalip, WA 98271              | Diane DeJong<br>11250 – 31 <sup>st</sup> Place NE<br>Lake Stevens, WA 98258 |
| Rita Beitz<br>515 – 172 <sup>nd</sup> Street NE<br>Arlington, WA 98223          | Brenda Jean Smith<br>23402 Woods Creek Road<br>Snohomish, WA 98290              | John Beitz<br>515 – 172 <sup>nd</sup> Street NE<br>Arlington, WA 98223      |
| Roy Fuller<br>5807 - 64 <sup>th</sup> Street SE<br>Snohomish, WA 98290          | Brendon William Ruppel<br>23402 Woods Creek Road<br>Snohomish, WA 98290         | Mary Lou Burns<br>16011 – 95 <sup>th</sup> Avenue SE<br>Snohomish, WA 98296 |
| James Maclin<br>5817 Silvana Terrace Rd.<br>Stanwood, WA 98292                  | Katie Sheffield<br>20119 – 118 <sup>th</sup> Street SE<br>Snohomish, WA 98290   | June Maclin<br>5817 Silvana Terrace Rd.<br>Stanwood, WA 98292               |
| Lisa Cummings<br>1623 Meadow Place<br>Snohomish, WA 98290                       | Thomas J. Prettyman<br>16710 – 58 <sup>th</sup> Avenue NW<br>Stanwood, WA 98292 | Randy Tendering<br>212 W. Jensen Street<br>Arlington, WA 98223              |
| Bob Kaldor<br>10907 – 23 <sup>rd</sup> Drive SE<br>Everett, WA 98208            | Karol Jones<br>6203 Marine Drive<br>Tulalip, WA 98271                           | Melissa Eller<br>18221 – 114 <sup>th</sup> Drive NE<br>Arlington, WA 98223  |
| Susan Mischel<br>16605 W.Lake Goodwin Rd.<br>Stanwood, WA 98292                 | Greg Burton<br>12123 – 52 <sup>nd</sup> Avenue NE<br>Marysville, WA 98271       | James Mischel<br>16605 W.Lake Goodwin Rd.<br>Stanwood, WA 98292             |
| Amber Fithian<br>13027 – 12 <sup>th</sup> Avenue NW<br>Marysville, WA 98271     | William Cook<br>820 Cady Road, #D101<br>Everett, WA 98203                       | Jamie Renninger<br>19505 Grannis Road<br>Bothell, WA 98012                  |
| Diane Mackay<br>9825 – 18 <sup>th</sup> Ave. West, #C3<br>Everett, WA 98204     | Annette Blandino<br>16823 – 123 <sup>rd</sup> Place NE<br>Arlington, WA 98223   | Jeremy Johnson<br>432 – 203 <sup>rd</sup> Street SW<br>Lynnwood, WA 98036   |

1 Andrew Marrone  
2 5709 – 137<sup>th</sup> Place SE  
Everett, WA 98053

Luke Determan  
6620 – 191<sup>st</sup> Street SW  
Lynnwood, WA 98036

Katie Perasso  
3402 – 103<sup>rd</sup> Avenue SE  
Lake Stevens, WA 98258

3 Carl Wedekind  
4 18309 E. Country Club Dr.  
Arlington, WA 98223

Diane Barker  
17409 Redhawk Drive  
Arlington, WA 98223

Terry O’Connell  
9711 – 52<sup>nd</sup> Avenue NE  
Marysville, WA 98270

5 I certify under penalty of perjury under the laws of the state of Washington that the  
6 foregoing is true and correct.

7 DATED this 14<sup>th</sup> day of January, 2022.

8  
9 /s/ Cynthia L. Ryden  
10 Cindy Ryden, Legal Assistant  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27